PROFERT OF THE PERSON.

In the early history of English law the rule was that accused persons were compelled to answer to any criminal charge brought against them. The practice was akin to denying to a prisoner the right to be defended at his trial, or to exculpate himself by the testimony of witnesses—a practice derived from the civil law.[1] But all this gradually was changed, and *nemo tenebatur prodere seipsum* became a maxim of the law. This maxim has been incorporated into the fundamental law, and established in the Constitution of the United States, as well as in those of the several States, when it has been expressly provided that no accused person shall be compelled to give evidence against himself in any criminal case.

Can the courts order a person accused of crime to make profert of his person—to submit to a compulsory examination of his person—or would this be, in effect, compelling him to give evidence against himself, and therefore a violation of his constitutional rights? This is an interesting question, which has been somewhat considered by the courts, but still seems unsettled and debatable.

In 1858, the Supreme Court of North Carolina, in what is known as Jacob's Case,[2] held that a defendant could not be compelled to exhibit himself to the inspection of a jury for the purpose of enabling them to determine his *status* as a free negro. And in 1872, in Johnson's Case,[3] the above ruling was approved by the same court. Two years later the question was again before this court in Garrett's Case.[4] In that case it appeared that the defendant had stated to persons present on the night of the homicide that the deceased came to her death by her clothes accidentally catching fire while the deceased was asleep, and that she, the defendant, in attempting to put out the flames burnt one of her hands. At the coroner's inquest, the defendant was compelled to unwrap the hand which she had stated was burnt, and exhibit it to a physician in order that he might see whether there was any indication of burn upon it. And it was held that the actual condition of her hand, although she was ordered by the coroner to exhibit it to the doctor, was inadmissible evidence. Jacob's Case was distinguished as follows: "The distinction between that and our case is, that in Jacob's Case, the prisoner himself, on trial, was compelled to exhibit himself to the jury, that they might see that he was within the prohibited degree of color, thus he was forced to become a witness against himself. This was held to be error. In our case, not the prisoner, but the witnesses, were called to prove what they saw upon inspecting the prisoner's hand, although that inspection was obtained by intimidation." In Nevada it has been held that the court could lawfully compel a criminal defendant, against his objection, to exhibit his bare arm, for the purpose of determining whether it had on it certain tatoo marks. The question of identity was raised, and a witness had testified that he knew the defendant, and knew that he had tatoo marks, which he described, on his right fore-arm. The case is among the best considered, perhaps is the best considered, of those sustaining a similar view of this subject. It is worth while to quote from it as follows: "The object of every criminal trial is to ascertain the truth. The Constitution prohibits the State from compelling a defendant to be a witness against himself, because it was believed that he might, by the flattery of hope, or suspicion of fear, be induced to tell a falsehood. None of the many reasons urged against the rack, or torture, or against the rule compelling a man to be a witness against himself, can be urged against the act of compelling a defendant, upon a criminal trial, to bare his arm in the presence of the jury so as to enable them to discover whether or not a certain mark could be seen imprinted thereon. Such an examination could not, in the very nature of things, lead to a falsehood. In fact, its only object is to discover the truth; and it would be a sad commentary upon the wisdom of the framers of our Constitution to say that by the adoption of such a clause they have effectually closed the door of investigation tending to establish the truth. Confessions of persons accused of crime, whenever obtained by the influence of hope or fear, are excluded, because in considering the motive

1 See 4 Blackstone, 355, 359.
2 5 Jones, 259.
3 67 N. C., 58.
4 71 N. C., 58.

which actuate the mind of man, they might be induced to make a false statement. Yet, notwithstanding the universality of this rule of law, whenever the confession, however improperly or illegally obtained, has led to the discovery of any given fact, that fact is always admitted in evidence, because the reasons which would have excluded the confession no longer exist. This is the governing and controlling principle of the law. The Constitution means just what a fair and reasonable interpretation of its language imports. No person shall be compelled to be a witness, that is, to testify, against himself. To use the common phrase, it 'closes the mouth' of the prisoner. A defendant in a criminal case can not be compelled to give evidence under oath or affirmation, or make any statement for the purpose of proving or disproving any question at issue before any tribunal, court, judge or magistrate. This is the shield under which he is protected by the strong arm of the law, and this protection was given, not for the purpose of evading the truth, but, as before stated, for the reason that in the sound judgment of the men who framed the Constitution, it was thought that owing to the weakness of human nature and the various motives that actuate mankind, a defendant accused of crime might be tempted to give testimony against himself that was not true." [5]

This is certainly a strong presentation of this side of the question, and we confess that we do not see how the application of the principle for which the court contends in any way infringes on any right which is essential to the protection of innocent persons unjustly accused. Courts and legislatures have gone quite far enough in the line of making it next to impossible to convict in criminal cases.

In a case decided in the Court of Appeals of Texas in 1879, this question was presented, although in a different form, but a similar conclusion was reached to that announced above. The prisoner was on trial for murder, and the prosecution proved that foot-prints were found on the premises where the murder had been committed, and was allowed to prove over the objection of the defense, that the examining magistrate compelled the defendant to make his foot-prints in an ash-heap, and that the foot-prints so made corresponded with those found on the premises where the homicide was committed. Council argued that if the prisoner could be compelled to make an impression with his foot in order to see whether it was similar to that made by the foot of the person who committed the crime, then if he were charged with forgery he could be compelled to take a pen and write, in order to see if his handwriting was similar to that of the party who had committed the forgery. And this it is said he may now be compelled to do by statute in England.[6] But the court declared that this was no violation of the constitutional privilege that one accused of crime shall not be compelled to give evidence against himself.[7]

And so in North Carolina it was held in 1876, that an officer who had made the arrest and compelled the prisoner to put his foot in a track found near where the larceny was committed, could testify to the result of the comparison thus made.[8] But, on the same facts, a different conclusion was reached in Georgia[9] in 1879, no reference being made to cases elsewhere decided; and in Tennessee in 1876, where a pan of soft mud was brought into the court room on the trial and the prisoner was asked, in the presence of the jury, to put his foot into it, which he declined to do. The case was reversed for the reason that the prisoner was asked in the presence of the jury to make evidence against himself, and that his refusal improperly influenced the jury.[10]

In New York a similar view was taken of this question. The subject was there presented in a case which involved the question whether the prisoner had been delivered of a child. The coroner directed two physicians to go to the jail where the woman was imprisoned, and examine her breasts and private parts, for the purpose of determining whether she had recently been delivered of a child. She denied having been pregnant, and objected to being examined by the phy-

[5] State v. Ah Chuey, 14 Nev. 79; s. c., 1 Crim. Law Mag., 634.

[6] See 22 Alb. L. J., 145.

[7] Walker v. State, 7 Tex. Ct. App., 245, 265.

[8] State v. Graham, 74 N. C. 646; s. c., 21 Am. Rep. 493.

[9] Day v. State, 63 Ga. 667.

[10] Stokes v. State, 5 Baxt. 519; s. c., 30 Am. R. 72.

sicians. But on being told that if she did not voluntarily submit to the examination force would be used and she would be compelled to submit, she yielded, and the physicians examined her private parts with a speculum, and also made an examination of her breasts. The court, however, refused to allow them to testify to the opinion which they formed from the examination in question, and declared that such an examination was in violation of the spirit and meaning of the constitutional provision that no person should be compelled in any criminal case to be a witness against himself. "They might as well have sworn the prisoner and compelled her, by threats, to testify that she had been pregnant and been delivered of the child, as to have compelled her, by threats, to allow them to look into her person with the aid of a speculum, to ascertain whether she had been pregnant, and been recently delivered of a child." [11]

And a similar view of this question has been taken in a case lately decided in the Supreme Court of Georgia. In that case, the question was whether the prisoner could be compelled by order and command of the court to make profert of his person so that a witness could be enabled to testify, from personal inspection, as to the character and extent of the amputation of the prisoner's right leg. The prisoner was on trial for murder, and a material and important part of the testimony against him was the character of the track and signs made the night of the murder by the one who, in the dark, approached the house where the deceased was, and fired the fatal shot. These tracks indicated that the murderer had but one leg, and the character of the other print upon the ground depended materially upon the character of the amputation of the other limb. And it was for the purpose of establishing the correspondence between the amputated limb and the prints on the ground, that the prisoner was ordered to make profert of his limb to a witness. It was held that the evidence of the witness based on such profert could not be received.[12]

It appears, therefore, that there is a decided conflict in the cases on the question. The courts of North Carolina, Nevada and Texas have recognized the right of the court to compel a prisoner to make profert of his person, while this right has been denied in New York, Georgia and Tennessee. But if the court can not admit the testimony of physicians who have made a compulsory examination of the person of a prisoner, is there any right to admit the testimony of police officers who have made a compulsory search of his person, as to counterfeit money or any other *indicia* of crime which they may have found concealed on his person. This is every day's practice, and yet it is difficult to see wherein such testimony differs from that of medical experts who have examined his person. It would seem that if such testimony is in the one case compelling the prisoner to give evidence against himself, it is equally so in the other. But it is the opinion of the writer that in neither case is such testimony to be considered as a violation of any constitutional right which the prisoner possesses. Whether the court can compel a person to submit to an examination by physicians in a civil action, is a vastly different question. And it has been held that the court may order such a compulsory examination of the person of the plaintiff, in an action for damages for injuries done to the person. The Supreme Court of Iowa has lately held that in such cases the court may, on the application of the defendant, order the plaintiff to submit his person to an examination by physicians and surgeons for the purpose of ascertaining the character and extent of the injuries alleged. The court declared in this case that the refusal of the plaintiff to submit to an examination so ordered, would render the party liable to punishment for contempt of court, and that if refusal was continued so long as to effectively obstruct the progress of the case, all allegations as to personal injuries might be stricken from the pleadings. "Under the explicit directions of the court, the physicians should have been restrained from imperilling in any degree the life or health of the plaintiff. The use of anaesthetics, opiates or drugs of any kind, should have been forbidden, if, indeed, it had been proposed, and it should have prescribed that he should be subjected to no tests painful in their character." [13]

[11] People v. McCoy, 45 How. Pr. 216.
[12] Blackwell v. State, 3 Crim. Law Mag. 394.
[13] Schroeder v. Chicago, etc. R. Co., 47 Iowa, 375.

Wherever impotency has been acknowledged as an impediment to marriage, the courts have compelled the parties in proceedings to obtain a decree of nullity, to submit their persons to an examination by medical experts, whenever such an examination was necessary for the purpose of determining the fact of impotency. This arises from the necessity of the case, especially in the case of females; for impotency on the part of the female, which can not be cured by proper medical treatment or a surgical operation, is pronounced to be rare. And divorce for the impotency of the female is limited to cases of an impervious or supposed impervious vagina, from an original malformation or the effect of some supervening infirmity or disease, as mere sterility is not sufficient ground for a decree of nullity. "From the very nature of the case, it appears to be impossible to ascertain the fact of incurable impotency, especially in those cases where the husband is the complaining party, except by a proper surgical examination by skillful and competent surgeons in connection with other testimony. * * * * And I have no doubt as to the power of this court to compel the parties, in such a suit, to submit to a surgical examination, whenever it is necessary to ascertain facts which are essential to the proper decision of the case."[14] As it is essential that the impotency should be incurable,[15] it is necessary that the fact of incurability should be made out by the evidence of medical experts who have made a personal examination of the party whose impotency is alleged. The right of the court to order such an examination, and the necessity for making such an order, can no longer be considered as involved in any doubt whatever.[16] And when the wife is the plaintiff, and the libel states her to have been a spinster at the time of the marriage, it is usual to order an inspection of her person as well as that of the husband, because her virginity and capacity implies his impotency.[17]

[14] Devenbagh v. Devenbagh, 5 Paige, 554.

[15] Brown v. Brown, 1 Haggard, 523.

[16] Briggs v. Morgan, 3 Phillimore, 325; Welde v. Welde, 2 Lee, 580; H— v. P— (L. R.), 3 Prob. & Div. 126; G—v. G— (L. R.), Prob. & Div. 287; Newell v. Newell, 9 Paige, 26.

[17] Coote's Ecc. Pr. 367. And see Norton v. Seton, 3 Phillimore, 147.

According to the English practice, the inspection was intrusted to three medical experts, either two physicians and a surgeon, or two surgeons and a physician; the adverse party having the privilege of naming one or more.[18] In this country we find Chancellor Walworth declaring that the examination should be made by "physicians of intelligence or skill, who, by study or practice, have made themselves well acquainted with the nature and progress of the disease which has caused the defendant's present incapacity."[19] And in this same case the Chancellor said: "The defendant must therefore submit to such an examination by one or more respectable gentlemen of the medical profession, who may be named for that purpose by the husband, with the sanction of the court. * * * * Such medical attendants as she may think proper to call in are also to be present at the time of her examination by the complainant's professional witnesses." In another case in the same court it is said that in the selection of the experts, due regard will be paid to the feelings and wishes of the defendant.[20] In an English case, decided as early as 1730, the case of Welde v. Welde,[21] the inspection of the wife was made by midwives, while that of the husband was made by physicians duly appointed by the court for that purpose. And in all cases a proper respect for the feelings of the party to be examined requires that the number of experts appointed by the court to make the examination, should be restricted to the smallest number consistent with the interests of justice.

There may be cases, however, of alleged impotency, in which the court will not feel under any necessity to order a personal examination of the party to be made. When the party against whom impotency is alleged, has already submitted to an examination of competent physicians, whose testimony can be readily obtained, it is said that a further examination will not be insisted on by the court.[22] But where the wife claimed that her incapacity existed at the time of the trial, but

[18] Coote's Ecc. Pr. 388. And see Dean v. Aveling, 1 Robertson, 279.

[19] Newell v. Newell, 9 Paige, 26.

[20] Devenbagh v. Devenbagh, 5 Paige, 541, 558.

[21] 2 Lee, 580.

[22] Brown v. Brown, 1 Haggard, 523, note a; Devenbagh v. Devenbagh, 5 Paige, 554, 558

not at the time of the marriage, and to prove her claim produced the certificate of two medical gentlemen who had examined her recently, expressing their belief that her incapacity had arisen since the marriage, Chancellor Walworth, upon the application of the husband, ordered that she should submit to another examination at the hands of experts appointed by the court, declaring that under the peculiar circumstances of the case, the complainant ought not to be compelled to leave the decision of his cause to rest solely upon an *ex parte* examination made by physicians who had been selected for the purpose by the wife herself.[23]

The husband must, of course, furnish all the necessaay funds to pay the expenses of the surgical examination.[24] And if the wife refuses to submit herself to the examination ordered by the court, the allowance of her alimony may be suspended until she consents to the examination as directed.[25] And either party refusing to submit to such an examination might undoubtedly be punished for contempt of court.[26] But as a refusal to submit to the examination has been regarded as evidence of incapacity,[27] a party will ordinarily hesitate long before refusing compliance with the order of the court in such cases.

And after the medical experts have made their examination of the person according to the direction of the court, and given in their testimony, such testimony is to be received and weighed with great caution, and Sir John Nichol has gone so far as to declare that he is "not aware that it has ever been held sufficient alone" to justify the court in granting a decree of nullity.[28] There ought to be other evidence to supplement that given by the medical witnesses, in order to justify a court in annuling a marriage on the ground of the impotency of one of the parties.

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[23] Newell v. Newell, 9 Paige, 26.
[24] Devenbagh v. Devenbagh, 5 Paige, 554, 558.
[25] Newell v. Newell, 9 Paige, 26.
[26] See Schroeder v. Chicago, etc. R. Co., 47 Iowa, 375.
[27] Harrison v. Harrison, 4 Moore P. C. 96, 103; Lord Brougham's Opinion. See, too, H— v. P— (L. R.), 3 Prob. & Div. 126. The court should be satisfied, however, that there was no collusion between the parties. Pollard v. Wybourn, 1 Hagg. Eccles. 725; Sparrow v. Harrison, 3 Curtis, 16.
[28] Norton v. Seton, 3 Phillimore, 147.

EXPERT TESTIMONY IN INSANITY CASES.

The increasing tendency of counsel retained in a case to rely upon the defense of insanity to accomplish an acquittal of the prisoner, and the latitude allowed them in introducing experts to testify to the prisoners insanity, and now especially the favor with which juries regard such experts, has given rise to numerous adjudications upon the subject of who should be competent to testify in relation to the prisoner's sanity or insanity. And the cases involving similar questions arising in contests as to the condition of a testator's mind are also numerous. When expert testimony was first introduced in trials great deference was paid to it, for the reason, no doubt, that an expert called as a witness represented the science as to which he was called to testify, and on account of his familiarity with it, having made it a study, he was recognized as being a better witness than those not specially skilled in his art. But of late this belief that an expert was more credible than an ordinary witness, has been in a great many cases destroyed. One thing in particular has tended to disabuse the minds of jurors that greater reliance should be placed upon the testimony of experts than that of ordinary witnesses, and that is, at the present time, the practice is to remunerate experts in proportion to the importance of the testimony they are to give. If, for instance, an expert were to receive a large fee for his testimony in a required case, it is obvious his mind would be more or less biased in favor of the side by which he was called to testify. When a witness comes into court to testify in scientific matters, it should in a measure affect his credibility, if he has accepted a retainer sufficient to bias his opinion. Lord Campbell, in Tracy Peerage,[1] says that "skilled witnesses come with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence."[2]

A jury might well be suspicious of an attorney who testified in his own case, and the

[1] 10 Cl. & Fin., 154.
[2] See, also, Gay v. Life Ins. Co., 2 Big. 14; Brehm v. R. Co., 34 Barb. 256; Grigsby v. Water Co., 40 Cal. 396; Winans v. R. Co., 21 How. 101; Watson v. Anderson, 13 Ala. 202.